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No. 99-1283

In the Supreme Court of the United States

SURESH KUMAR, AKA SAM KUMAR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether 18 U.S.C. 844(i) (Supp. IV 1998), which prohibits the destruction by fire of a building or other property "used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce," was properly applied to a hotel that served interstate guests, had a franchise contract with an out-of-state franchiser, and was insured by an out-of-state insurance company.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-38a) is unpublished, but the decision is noted at 187 F.3d 639 (Table).

JURISDICTION

The judgment of the court of appeals was entered on July 19, 1999. A petition for rehearing was denied on September 3, 1999 (Pet. App. 39a). The petition for a writ of certiorari was filed on December 2, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Kentucky, petitioner

was convicted of conspiracy, in violation of 18 U.S.C. 371; arson resulting in death and injuries, in violation of 18 U.S.C. 844(i) (Supp. IV 1998) and 18 U.S.C. 2; and mail fraud, in violation of 18 U.S.C. 1341. He was sentenced to life imprisonment and was ordered to pay $28,506.92 in restitution. C.A. App. 74-80 (Judgment). The court of appeals affirmed. Pet. App. 1a-38a.

1. In March 1995, petitioner formed a corporation for the purpose of purchasing a Howard Johnson hotel in Bowling Green, Kentucky. The corporation purchased the hotel for $960,000. Pursuant to its license agreement, the corporation was given 90 days to make $431,000 in improvements to bring the hotel up to quality assurance standards. The hotel suffered financial problems, and by May 1995 it was listed for sale. Petitioner and his brother-in-law hired a man to burn down the hotel. The fire was set on January 6, 1996. It resulted in the deaths of four people and injuries to 15 others. Petitioner filed an insurance claim for more than $4.5 million against an insurance company located outside the State. Pet. App. 1a-3a, 37a.

Petitioner was convicted of violating (*inter alia*) 18 U.S.C. 844(i) (Supp. IV 1998). Section 844(i) establishes criminal penalties for any person who "maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce." Section 844(i) provides for increased penalties (including the death penalty or life imprisonment) if death results from the offense.

2. The court of appeals affirmed. Pet. App. 1a-38a. Petitioner contended, *inter alia*, that the evidence was insufficient to establish the nexus between the victimized property and interstate commerce that Section

844(i) requires. The court of appeals rejected that claim, explaining that "[t]he 'used in interstate commerce' element [of the statute] is satisfied if the government proves that the building in question has some relationship to an activity of a commercial nature." *Id.* at 37a. The court found that the Howard Johnson hotel bore the requisite relationship to commercial activity:

> In this case, the government introduced evidence that guests staying at the hotel traveled in interstate commerce, as the Howard Johnson operated as a commercial business, providing temporary services to people traveling in interstate commerce, that the hotel had an insurance contract with an out-of-state insurance company, and that the hotel had a franchise contract with an out-of-state franchiser, which resulted in regular mail and telephone communication. The law required only a minimal connection between the property and some aspect of interstate commerce, and the government produced adequate proof at trial to show that the hotel had a substantial effect on interstate commerce. We therefore find that sufficient evidence supports [petitioner's] § [844(i)] conviction.

Ibid.

ARGUMENT

Petitioner contends (Pet. 13-23) that the connections to interstate commerce in this case are insufficient to satisfy Section 844(i) and the Constitution. He also observes (Pet. 21) that the Court recently granted certiorari in *Jones* v. *United States*, No. 99-5739 (argued Mar. 21, 2000), to decide whether "Section 844(i) applies to the arson of a private residence; and if so, whether its application to the private residence in the present

case is constitutional." 120 S. Ct. 494 (1999). Petitioner's legal arguments are without merit, and the Court's decision in *Jones* is unlikely to affect the proper disposition of this case. The petition for a writ of certiorari should be denied.

Section 844(i) applies to the arson of any building or other property "used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce." In *Russell* v. *United States*, 471 U.S. 858 (1985), this Court upheld a federal conviction for arson involving a two-unit apartment building used as rental property. The Court recognized that Section 844(i)'s "reference to 'any building . . . used . . . in any activity affecting interstate or foreign commerce' expresses an intent by Congress to exercise its full power under the Commerce Clause." *Id.* at 859. The Court observed that "the legislative history [of Section 844(i)] suggests that Congress at least intended to protect all business property, as well as some additional property that might not fit that description, but perhaps not every private home." *Id.* at 862. Consistent with the decision in *Russell*, the courts of appeals have uniformly recognized that the destruction of commercial or business property is within the reach of Section 844(i) and the commerce power. See, *e.g.*, *United States* v. *Serang*, 156 F.3d 910, 913-914 (9th Cir.), cert. denied, 525 U.S. 1059 (1998); *United States* v. *Ruiz*, 105 F.3d 1492, 1499-1500 (1st Cir. 1997).

The petition for certiorari need not be held pending the decision in *Jones*. The question presented in *Jones*, as formulated by this Court, specifically concerns the application of Section 844(i) to the destruction of residential property. See 120 S. Ct. 494 (1999). The decision in *Jones* is therefore unlikely to affect the disposition of this case or to upset the settled law that now

prevails in the courts of appeals concerning the application of Section 844(i) to business property.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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